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One Year Review of Civil Procedure and Appeals

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ONE YEAR REVIEW OF CIVIL PROCEDURE AND APPEALS

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There were no changes of the Colorado Rules of Civil Procedure in 1962 except by judicial interpretation. This stability in the rules in 1962 portended possible changes in the rules in 1963. By order of the Supreme Court of the United States on January 21, 1963, the Federal Rules of Civil Procedure were changed in many respects. Predictably, the Colorado Supreme Court may consider revising the Colorado Rules of Civil Procedure to conform to the revised Federal Rules of Civil Procedure in 1963.

On numerous occasions, the Colorado Supreme Court was asked to interpret the Colorado Rules of Civil Procedure in 1962. It heard new questions and interpreted and re-examined its findings of past years. As one might expect, problems of civil procedure tend to find their way into almost every case before the supreme court. Problems involving the rules of procedure were found in 57 of the approximately 242 cases decided by the court.

Since the rules have meaning only in their use, not the order in which they are organized, the following attempt to classify the rule interpretations of 1962, according to use, is presented.

I. THE COMPLAINT

Rule 2 of the Colorado Rules of Civil Procedure states: "There shall be one form of action to be known as 'civil action.' " The action shall be commenced by filing of a complaint or by service of a summons.[1] The complaint shall contain " a short and plain statement of the claim showing that the pleader is entitled to relief."[2] The court had an opportunity to give meaning to these rules, which we so often remember but so infrequently use.

In *Bernstein v. Dun & Bradstreet, Inc.*,[3] the supreme court considered dismissal of a libel complaint. It said: "Colorado's Rules of Civil Procedure are designed to dispense with ritualistic, common-law, forms-of-action pleadings."[4]

After reviewing the libel complaint and finding a libel *per quod*, rather than a libel *per se*, the court determined that special damages needed to be pleaded. The court sustained the trial court's dismissal of the libel complaint for failure to properly supply the essential allegations of special damages, after opportunity had been afforded to do so, stating:

> In view of our liberal policy under these rules of dispensing with the overly technical aspects of common-law pleading, the trial court had the discretion to allow the plaintiff the opportunity of supplying the essential allegation of special damages by a More Definite Statement . . . .

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1 Colo. R. Civ. P. 3(a).
2 Colo. R. Civ. P. 8(a).
3 368 P.2d 780 (Colo. 1962).
4 *Id.* at 782.

> The trial court merely afforded plaintiff an additional opportunity of remedying what it considered to be a fatal defect in his complaint.[5]

Moreover, the supreme court again recognized the liberal rules of pleading but insisted that pleadings must continue to insist upon the essential elements of the substantive law. Liberal rules to the contrary notwithstanding, a pleader must still assert the elements of the claim or his complaint will be dismissed. The complaint *must* state a claim.

As already noted, one manner of commencing a civil action is filing a complaint with the court.[6] In *Martin v. District Court,*[7] two complaints were filed on the same subject matter. One party contended that she "commenced" an action in the Denver District Court by service of summons and complaint on her opponent. However, her complaint was not filed until some days later. The adverse party filed a complaint in the District Court of Adams County prior to the filing of the complaint in the Denver District Court suit. Propriety of service of process out of the Denver court's suit was challenged. Service of process in Denver having been found valid, the Denver suit was "commenced," according to the rules, before the Adams County suit was commenced. This being true, the court found that the Denver District Court had exclusive jurisdiction over the controversy and ordered suspension of any further action in the Adams County District Court.[8] The alternative of service of process being prior in time to the filing of the complaint in the court, the "commencement" provisions of Rule 3(a) applied and the concurrent jurisdictions of two courts, each having received complaints, was resolved.

The alternative of "commencement of an action" by service of summons is attended with the requirement that "a complaint must be filed within ten days after the summons is served, or, the action may be dismissed without prejudice and in such case the court may, in its discretion, if it shall be of the opinion that the action was vexatiously commenced, tax a reasonable attorney's fee as cost in favor of the defendant, to be recovered of the plaintiff or his attorney."[9] In *Schwarz v. Ulmer,*[10] the trial court awarded defendants $100.00 for alleged failure of plaintiff's attorney to serve a complaint on her within ten days of service of summons. The supreme court, after reviewing the record, observed that there was "(1) no evidence as to whether the complaint was or was not *filed;* (2) no expression of the opinion by the court that the action was vexatiously commenced; (3) no evidence as to what amount would constitute a reasonable attorney's fee to be taxed as cost."[11] In reversing the award of $100.00 attorney's fee in favor of the defendant, the court literally interpreted the provisions of Rule 3(a) requiring evidence of non-filing vexatiousness, and reasonability of attorney's fee.

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5 *Id.* at 783.
6 Colo. R. Civ. P. 3(a).
7 375 P.2d 105 (Colo. 1962).
8 Colo. R. Civ. P. 3(b) provides: "The court shall have jurisdiction from the time of filing the complaint or service of summons."
9 Colo. R. Civ. P. 3(a).
10 370 P.2d 889 (Colo. 1962).
11 *Id.* at 896.

II. JURISDICTION OF THE COURT

Rule 8(a) requires a jurisdictional statement in the complaint, should the court be of limited jurisdiction. There were no Colorado cases challenging the authority of a court of limited jurisdiction in 1962. Nevertheless, the question of jurisdiction of the court must be considered concurrently with the question of sufficiency of the complaint. If the court in which the complaint is filed does not have jurisdiction, the filing of that complaint becomes meaningless.

The question of the court's jurisdiction over the subject matter did arise in 1962, as did the question of jurisdiction over the person of defendants.

Jurisdiction over Subject Matter.—In *Triebelhorn v. Turzanski*,[12] the Colorado Supreme Court affirmed the hornbook principles

12 370 P.2d 757 (Colo. 1962).

that lack of jurisdiction over the subject matter can be raised at any time and that a judgment entered in a case over which the court did not have jurisdiction over the subject matter is void. The case involved an order of conveyance of real property which followed a final decree of divorce by more than a year. The final decree of divorce made no mention of division of property owned by the parties nor did it reserve the matter for future consideration. The trial court's order for conveyance of the real property was reversed and vacated. The court recited the argument of the petitioner that her former husband did not originally challenge the order for conveyance, saying:

> Such argument overlooks the rule that the defense of lack of jurisdiction over the subject matter can be raised at any time, even for the first time in this Court, and that a trial court which in fact lacks jurisdiction over the subject matter cannot acquire jurisdiction even though the parties expressly or impliedly consent thereto.[13]

In September, 1962, the Colorado Supreme Court considered the jurisdiction of state courts over the Southern Ute Tribe, a corporate entity. In *Martinez v. Southern Ute Tribe*,[14] the plaintiff sued the Indian tribe for damages for denying him membership in the corporate entity and the benefits that flow therefrom. The tribe filed a motion to dismiss on the ground that the courts of Colorado have no jurisdiction over the subject matter; that any attempt by a state court to determine the rights of membership in an Indian tribe would be an invasion of the right of sovereignity of the tribe—those rights being solely under the control of the tribe. The trial court sustained the motion. The Colorado court recited that the tribe had adopted a corporate charter wherein the tribe agreed: "To sue and be sued in courts of competent jurisdiction within the United States. . . ."[15] It concluded that adopting such provisions and incorporating under 25 U.S.C. § 476, the tribe had rendered itself amenable to suit in Colorado courts. The court further cited article II, section 6, of the Constitution of the State of Colorado, guaranteeing protection of the courts of justice to all persons, and cited the 14th amendment of the United States Constitution. The supreme court reversed the trial court's determination and directed that the motion to dismiss filed in the trial court be denied. The complexity of the constitutional issue raised by this case affords interesting speculation as to what the United States Supreme Court might decide should certiorari be granted.

Jurisdiction over the Person.—The question of jurisdiction over the person of individuals did not arise in 1962. Usually, there is at least one case involving the nonresident motorist statute. With a recently amended nonresident motorist statute,[16] wherein residents who have absented themselves from the state remain personally subject to the jurisdiction of the court, it is surprising that the jurisdictional issue did not come before the Colorado Supreme Court in 1962.

Jurisdiction over the person of corporations was twice consid-

13 *Id.* at 759.
14 374 P.2d 691 (Colo. 1962).
15 *Id.* at 693.
16 Colo. Rev. Stat. § 13-8-5(ff) (1953).

ered by the supreme court. The evasiveness of the "person" of a corporation logically becomes the subject of much dispute. Generally, the Colorado court re-established a well known principle that in order to subject a corporation to the jurisdiction of a Colorado court, the corporation must be "doing business" in Colorado. Jurisdiction over the "person" by establishing "doing business" must be established before service of process is effective. Merely obtaining proper service of process without first establishing jurisdiction does not subject the corporation to jurisdiction of a Colorado court.

Bay Aviation Services v. District Court[17] considers a suit wherein the summons and complaint were served on the Secretary of State, under the Colorado Corporation Act, for damages against a corporation as a result of an accident in an aircraft temporarily in Colorado. The trial court held that the provisions of the Colorado Corporations Act allowing service of process on the Secretary of State were complied with; that the corporation was not qualified to do business in Colorado; that at the time of the accident the corporation was in Colorado for one instance; and that normally this would not be sufficient to constitute "doing business" in Colorado. Under the circumstances, however, it exercised its sound discretion and denied the corporation's motion to quash. The Colorado Supreme Court, after review of the facts and the findings of the trial court, found that the corporation was "not transacting business" or "doing business" in Colorado, and hence the service of complaint and summons in an action for death resulting from such accident could not be made on the Secretary of State as agent for the corporation. Moreover, the court again affirmed that without jurisdiction of the person of the corporation, proper service of process was ineffective. It should be added that the finding in the *Bay Aviation* case establishes that a single transaction in Colorado, to wit: one demonstration of an airplane, is not sufficient to establish "doing business" for purposes of jurisdiction. The determination of the question of the effect of a "single instance" not constituting doing business has been long overdue and it now appears to be part of our Colorado law.

A skeleton from the 1956 civil procedure closet again appeared in the reporters in *Bardahl Manufacturing Corp. v. District Court.*[18] In a prior case by the same name,[19] the supreme court ordered the trial court to hear motions to dismiss and quash service. After this order of the supreme court, the District Court of Jefferson County heard motions to dismiss and to quash service and determined that the court did not have jurisdiction over the corporation because the corporation was not "doing business" in Colorado. After this determination, the plaintiff attempted to serve alias summons as a result of evidence discovered in previous hearings. The corporation again moved to quash and these subsequent motions were denied. At the hearing on the motions to quash the second attempted service, the corporation resisted attempted service on an attorney in open court. The record was also devoid of new evidence that the corporation was "doing business" in Colorado. The supreme court held that the

17 370 P.2d 752 (Colo. 1962).
18 372 P.2d 447 (Colo. 1962).
19 Bardahl Manufacturing Corp. v. District Court, 134 Colo. 112, 300 P.2d 524 (1956).

original determination that the corporation was not "doing business" was res judicata and that the new attempted service was ineffective for two reasons: there was no new evidence that the corporation was "doing business" after the res judicata determination, and that service on an attorney in open court is improper unless the attorney has been specifically authorized to accept service for his client. It should be added that the supreme court taxed all costs of the determination to that person attempting to get service, saying that the corporation cannot be required to resist void service of process. There must be "doing business" by a corporation before any attempt to serve process, although such process is properly served, is effective.

Service of Process.—Once jurisdiction over the subject matter and the persons in a lawsuit is established, service of process must be properly made. *Bay Aviation Services*[20] and *Bardahl*[21] clearly show that service of process problems must follow jurisdictional problems. Should the jurisdictional hurdles be jumped, the propriety of service of process can be reviewed.

In *Bardahl,* attempted service of process on an attorney for the corporation was improper. "The law is well settled that attempted service on an attorney in open court, or on an attorney who is appearing specially in a state, is improper unless the attorney has been specifically authorized by his client to accept service. . . . The law is clear that general employment as an attorney is not sufficient grounds to serve his client by serving the attorney."[22]

In *Martin v. District Court,*[23] a defendant contended that service of process was improper where the process server placed a copy of the complaint and summons in an envelope and on the face of the envelope wrote "Personal. To Isaac Mellman." The envelope was delivered to Mr. Mellman's secretary and receptionist and the contents of the envelope were not explained to the secretary. The supreme court found that service was properly made on Mr. Mellman according to Rule 4(e) (2) of the Rules of Civil Procedure, saying:

> This rule requires that the copy of the summons and complaint be "delivered" to the proper person, but clearly by its own terms does *not* require that this "delivery" be accompanied by a reading aloud of the contents so served, or by explaining what they are, or by verbally advising the person sought to be served as to what he or she should do with the papers.[24]

The court then concluded that service of process was completed by the method above described.

This holding gives further meaning to Rule 4 (e) (1). The persons therein specified for personal service are, among others, a person's "stenographer, bookkeeper or chief clerk" (at his usual place of business). Apparently, secretaries and receptionists are now added to the list by judicial interpretation. Further, delivery of the process in an envelope, as long as it is personally delivered, would appear to effect proper service.

20 370 P.2d 752 (Colo. 1962).
21 372 P.2d 447 (Colo. 1962).
22 *Id.* at 449.
23 375 P.2d 105 (Colo. 1962).
24 *Id.* at 107.

No cases appeared in the reporters involving service by publication or other methods of service to obtain *in rem* jurisdiction. This is another surprise in view of the many cases on these subjects found each of preceding years.

III. MOTIONS DIRECTED TO THE COMPLAINT

Some of the problems of motions directed to a complaint have been covered above. Motions challenging the jurisdiction over the subject matter and over the person were filed in *Triebelhorn*,[25] *Martinez*,[26] *Bay Aviation Services*,[27] *Bardahl*,[28] and *Martin*.[29] The motions in these cases were variously labeled Motion to Dismiss and Motion to Quash. The Rules of Civil Procedure at Rule 12(b) provide that the defenses of lack of jurisdiction over the subject matter and lack of jurisdiction over the person, together with insufficiency of process or service of process, should be filed before further responsive pleading. Then, properly, motions attacking jurisdiction necessarily attack the sufficiency of the complaint. The rules do not tell us, however, the proper names which these motions should bear and no consistency of practice has designated those names. This writer would suggest that motions attacking jurisdiction should properly be labeled Motions to Dismiss on the grounds alleged. Possibly, the supreme court will clarify this semantic problem for us in 1963.

Motion to Dismiss.—Colorado cases in 1962 showed the variety of reasons for which a motion to dismiss may be filed under Rule 12(b). For example, the trial court in *Farmers Irrigation Co. v. Game and Fish Comm'n*,[30] granted a motion to dismiss the complaint filed by an adjudicated-owner of water rights against the State Game and Fish Commission for diversion of waters. The supreme court held that the motion to dismiss was wrongly granted in that a complaint alleging the diversion by the Commission, which diversion polluted the water so as to render it unfit for the purposes to which it had heretofore been applied by the plaintiff, stated a claim for damage and destruction. Damages for taking property without just compensation might be awarded if the facts were established at trial.

The question of what matters may be considered on a motion to dismiss was raised in *Markoff v. Barenberg*.[31] Therein, an assignment for benefit of creditors was made to one Connell. The plaintiff recorded his lien statement but filed no claim of the lien with the assignee for the benefit of creditors. He did, however, file an action to foreclose his lien. In the foreclosure suit, the assignee moved to dismiss contending that it was Markoff's duty to file his claim with the assignee. The trial court sustained the motion to dismiss. The supreme court held that the complaint, on its face, stated a good claim for relief. The court continued that the assignee for benefit of creditors was seeking to avoid the claim under Colo. Rev. Stat. § 11-1-1 (1953) on the grounds that the lienholder failed to

25 370 P.2d 757 (Colo. 1962).
26 374 P.2d 691 (Colo. 1962).
27 370 P.2d 752 (Colo. 1962).
28 372 P.2d 447 (Colo. 1962).
29 375 P.2d 105 (Colo. 1962).
30 369 P.2d 557 (Colo. 1962).
31 368 P.2d 964 (Colo. 1962).

file the claim with the assignee and that he therefore lost his rights. The court stated, however:

> The matters raised by the motion to dismiss were in the nature of avoidance, discharge and waiver, and were therefore affirmative defenses which under Rule 8, R.C.P. Colo., cannot be raised by motion but only by answer, the plaintiff thereafter having the opportunity to raise and try all issues concerning the force and effect of the particular assignment, as well as that of the constitutionality of the statute involved . . . .[32]

The court concluded that it was error to dismiss the complaint on a motion to dismiss.

A motion to dismiss is frequently filed attacking the capacity of the plaintiff to bring the suit. Rule 17(a) provides: "Every action shall be prosecuted in the name of the real party in interest . . . ." Following the spirit of this Rule, *Tanner v. City of Boulder*[33] involved a motion to dismiss attacking the propriety of parties plaintiff in an action challenging the validity of certain annexation and zoning ordinances. The trial court dismissed the action on the ground that the plaintiffs were not "aggrieved persons." The plaintiffs were both residents and taxpayers of the defendant City of Boulder; and they alleged that they were adversely affected by the ordinance in dispute. After citing Colo. Rev. Stat. § 139-11-6 (1953), which grants "aggrieved persons" the right to relief in annexation proceedings, the court concluded that the plaintiff residents and taxpayers had a right to be heard under the authority granted by the statute, saying:

> Their complaint made a prima facie showing of a violation of the city charter in the adoption of the questioned ordinance. As taxpayers and residents asserting that they had been adversely affected thereby, they had the right to challenge the ordinance in question.[34]

A dissenting opinion was filed by Mr. Justice McWilliams, who concluded that the plaintiffs were not "aggrieved" persons within the meaning of the statute. The statute applies only to landowners in the area annexed or sought to be annexed, "and does not include, as the majority has applied it, to the tens of thousands of residents, taxpayers and landowners in the City of Boulder."[35]

The district court, in an appeal from the county court on a claim filed in the decedent's estate, dismissed the appeal on the ground that the administrator was not "a person aggrieved" in *Gushurst v. Benham*.[36] Although this case does not involve the motion to dismiss as above described, it provides authority which could be used in arguing a motion to dismiss on real party in interest grounds. It holds that an administrator is a "person aggrieved" under Colo. Rev. Stat. § 37-6-10 (1953) for purposes of appeal from the county court to the district court in estate proceedings where a claim is allowed in a decedent's estate which is covered by insurance indemnity although the insurance policy is the only asset of

32 *Id.* at 965.
33 377 P.2d 945 (Colo. 1962).
34 *Id.* at 946.
35 *Id.* at 948.
36 376 P.2d 687 (Colo. 1962).

the estate. The supreme court held that the allowance of the claim in the estate for injuries done at the hand of the decedent put the estate in a worse position than when the estate was opened and, therefore, the administrator was a "person aggrieved."

Gayton v. Department of Highways[37] sets forth the basic test for governing motions to dismiss for failure to state a claim. Quoting from *Dillinger v. North Sterling Irrigation District*[38] the court recited: "In passing on a motion to dismiss the complaint for failure to state a claim, the court must consider only those matters stated within the four corners thereof."[39] After reciting the axiom "that for the purposes of ruling on a motion to dismiss the matters in the complaint are assumed to be true," the court affirmed the trial court's action granting the motion to dismiss. This was an action for damages by a property owner against the Department of Highways for erecting a bridge at the end of an alley which presumably cut off one means of access to the plaintiff's property. The court said:

> It is obvious that by the erection of this barricade at the east end of the alley Gayton has not been deprived of all access to her property, and that despite the barricade she still has reasonable access to the street system of Pueblo. Such being the case, she necessarily was unable to plead any special damage and her complaint therefore does not state a claim upon which relief can be granted.[40]

Motion for More Definite Statement.—In *Gayton* above, the defendant could presumably have moved for a more definite statement or bill of particulars under Rule 12(e). This would be on the authority of Rule 9(g), which states: "when items of special damage are claimed, they shall be specifically stated." Instead, a motion to dismiss was proper in the absence of pleading the special damages required as the court noted.

In *Bernstein v. Dun & Bradstreet*,[41] a motion for more definite statement was filed to the libel complaint and granted. The more definite statement which was filed indicated a libel *per quod* not a libel *per se*. In neither the complaint nor more definite statement were special damages pleaded. After an opportunity for leave to file an amended complaint, which opportunity was not followed by

37 367 P.2d 899 (Colo. 1962).
38 135 Colo. 100, 308 P.2d 608 (1957).
39 See note 37, *supra*.
40 *Id.* at 902-03.
41 368 P.2d 780 (Colo. 1962).

appropriate pleading on the part of the plaintiff, the trial court granted a motion to dismiss the action. The court then stated:

> Since special damages are an essential element of an action for libel *per quod* . . . plaintiff was required to specifically plead them. Having failed to do so the trial court could then have dismissed the plaintiff's complaint under Rule 12(b) (5), R.C.P. Colo., for failure to state a claim upon which relief could be granted. . . .[42]

The supreme court affirmed dismissal for the above reasons.

IV. Change of Venue

Under Rule 98, a motion for change of venue is properly filed to the complaint before responsive pleading. According to Rule 98(e), failure to file a motion for change of venue, together with motions under Rule 12(b), the right to file such motions is waived. Again, it is surprising that 1962 found no change of venue cases.

V. Intervention

Under Rule 24 of the Colorado Rules of Civil Procedure, certain persons may apply for permission to intervene in a lawsuit. Because intervention adds parties to a lawsuit who were not contemplated by the original parties, the court adopted Rule 24 and has on frequent occasions interpreted its rule. One interpretation is found in *Denver Chap. of the Colorado Motel Ass'n v. City and County of Denver*.[43] The motel association, contending that it had the right to intervene under Rule 24(a), petitioned to intervene in a suit instituted by the City and County of Denver against Thomas G. Currigan, as auditor of the city. The suit sought to compel the auditor to sign a contract with an architect for advice and analysis of proposals for a contemplated hotel operation at Stapleton Airfield in Denver. The intervenors, individual taxpayers and representatives of a class of taxpayers, contended that they had an absolute right to intervene in that they would be bound by a judgment in the action and in that they would not be adequately represented by existing parties in the suit, all of which is required by Rule 24(a). The court again affirmed the requirements of Rule 24(a) for intervention of right, saying:

> An application for intervention under Rule 24(a) (2) must show both that the representation of his interest by existing parties is or may be inadequate and that the applicant is or may be bound by the judgment in the action, and neither element, standing alone, is sufficient. If either factor is missing, there is no absolute right of intervention.[44]

The court found from statements in the intervenor's brief, and from the other evidence, that the intervenors would be adequately represented in the action. One of the requirements for intervention of right lacking, the supreme court affirmed the trial court's denial of intervention. The court added in the last paragraph of its opinion the following language which goes far in setting forth tests under Rule 24(a): "In the absence of such factors as fraud, collusion, bad

42 *Id.* at 782.
43 374 P.2d 494 (Colo. 1962).
44 *Id.* at 496.

faith and the like, a taxpayer cannot intervene as a matter of absolute right."[45]

VI. THE ANSWER

After determination of preliminary matters by motion as above outlined, the question of proper pleading by defendant in his answer should be considered.

As reported above in *Markoff v. Barenberg*,[46] certain matters in the nature of avoidance, discharge and waiver must be pleaded in the defendant's answer and are not properly raised by motion. Rules 8(b) and 8(c) set forth the details of the defenses. *Markoff* establishes that failing to file a claim with an assignee for the benefit of creditors, as required under the statutes, is such a matter of avoidance that must be raised by answer.

One of the affirmative defenses required to be raised by answer under Rule 8(c) is "estoppel." *Beery v. American Liberty Ins. Co.*[47] affirms the general principle that the doctrine of estoppel cannot be invoked against any governmental agency acting in its public capacity.

Rule 8(c) provides: "Any mitigating circumstances to reduce the amount of damages shall be affirmatively pleaded," and Rule 13 outlines the procedure for asserting counterclaims and setoffs. In *Transport Clearings of Colorado, Inc. v. Linstedt*,[48] a "counterclaim" was set up in a defendant's answer against the claim of a collection agency. The collection agency was the assignee of the person against whom the counterclaim was directed. The agency contended that the term "counterclaim" was improper and that a counterclaim could not be asserted against an assignee. The collection agency insisted that the title of the claim set forth in the answer should have been "set off." The court observed: "*De minimis non curat lex.* This is an $18.00 tempest over a tea cart."[49] In dismissing the collection agency's contention, the court recited Rule 8(c), which states: "When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so required, shall treat the pleadings as if there had been a proper designation."

In an action on a promissory note, the defendant in *Bernklau v. Stevens*[50] failed to affirmatively plead "failure of consideration" by answer. The defendant merely denied the indebtedness, alleged a tender of an installment payment and counterclaimed for damages as a result of breach of certain covenants. On writ of error, the defendant urged failure of consideration, which was sustained in the evidence. The supreme court dismissed this argument, saying:

> Defendants, however, must also fail here for they cannot avoid application of the rule that failure of consideration is an affirmative defense which, if not pleaded, is waived. Colo. R.C.P. Rule 8(c) and Rule 12(h). A careful review of the record in this case indicates that such defense

45 *Id.* at 496.
46 368 P.2d 964 (Colo. 1962).
47 375 P.2d 93 (Colo. 1962).
48 376 P.2d 518 (Colo. 1962).
49 *Id.* at 518.
50 371 P.2d 765 (Colo. 1962).

was neither pleaded nor raised at any stage of the trial court proceeding.[51]

Rule 8(c) requires that the defense of "res judicata" shall be set forth affirmatively in the answer, or other responsive pleading. Literally, res judicata means "thing decided."[52] The defense of res judicata was raised a number of times before the supreme court in 1962.

In a water rights' priority case, a prior action in which claims for certain water priorities were waived was res judicata.[53] In a damage suit for failure to deliver corporate stock, the United States District Court arbitration award was res judicata on the issue of the plaintiff's rights to the stock involved.[54] In the stock case, the court commented:

> The trial court mistakenly took the position that the United States District Court judgment was not res judicata of the issue before it because the parties were not identical since Hudson was not a party to that suit. What the court overlooked is that the parties need not be identical if their interests are identical, or if the party to the action is in privity with the party later asserting the doctrine of res judicata.[55]

Green v. Chaffee Ditch Co.[56] establishes that successors in interest to original appropriators of water rights are in privity with those original appropriators and a decree entered with respect to the original appropriators is res judicata against the successors. A prior determination of the state of title to real property was res judicata in an action to quiet title and cancellation of deeds where the same Burton was a party to both proceedings.[57] In an estate proceeding, the judgment entered by the county court, affirmed by the district court, and to which judgment writ of error was dismissed, was res judicata on a later attempt to raise the same issues in the county court by objection to the final report of the administratrix.[58]

VII. Service of Pleadings During Course of Case

After the court has acquired jurisdiction over the subject matter and the persons in any lawsuit, service of pleadings and other papers is governed by Rule 5 of the Rules of Civil Procedure. Service under Rule 5 is less formal than service to obtain jurisdiction which is prescribed by Rule 4. The Colorado Supreme Court twice construed the provisions of Rule 5.

In *Gould and Preisner, Inc. v. District Court*,[59] Gould and Preisner filed "Answer, Counterclaim and Cross Complaint" but failed to serve a copy of this pleading upon the other parties to the action. At the pre-trial conference, Gould and Preisner moved for leave to serve other defendants with the pleading, supporting the motion by alleging that the trial had just previously been set, that the omission was a result of mistake, inadvertence and excusable neglect

51 *Id.* at 770.
52 77 C.J.S., page 274.
53 Alloy v. Stina, 370 P.2d 440 (Colo. 1962).
54 Hudson v. Western Oil Fields, Inc., 374 P.2d 403 (Colo. 1962).
55 *Id.* at 405.
56 371 P.2d 775 (Colo. 1962).
57 Burton v. Garner, 374 P.2d 707 (Colo. 1962).
58 Clark v. Willis, 368 P.2d 968 (Colo. 1962).
59 369 P.2d 554 (Colo. 1962).

and that the other parties would not be prejudiced. The trial court denied Gould and Preisner's motion to serve the pleading. The supreme court reversed the trial court by finding that failure to serve the pleading was an inadvertent omission of counsel which could be corrected without prejudice to the rights of any other litigant involved in the action and stated:

> To uphold the action of the trial court under the circumstances above set forth would deprive the petitioners of claimed property rights and might well result in an unjust enrichment of other creditors whose claims may not be such as to entitle them to preference over the petitioner.[60]

VIII. MISCELLANEOUS MOTIONS BEFORE TRIAL

An attorney attempted to withdraw his appearance in *Holland v. Holland*.[61] The records show that the attorney's client was in Spain, that the client had no other counsel and that the trial court would be handicapped in its efforts to make proper orders in the interests of a minor child. The supreme court found no error in the trial court's denying leave to withdraw thereby sustaining the discretion of the trial court in acting upon the motion. In this divorce proceeding, which involved the custody of a minor child, the test appears to be whether the trial court used its discretion in acting on the motion for leave to withdraw as attorney of record.

More than three months after counsel had entered his appearance in a negligence case, a motion under Rule 97 to disqualify the trial judge was filed in *Dominic Leone Const. Co. v. District Court*.[62] The grounds appeared to be the relationship of the judge with one of the attorneys in the suit. A trial court postponed ruling on the motion to disqualify, reserving its ruling until the matter was at issue. The court cited Rule 97 and paraphrased it as follows: "Upon filing of the motion to disqualify then 'thereupon all other proceedings in the case . . . [were] suspended until . . . [the] ruling . . . [was] made thereon.' "[63] The supreme court ordered that the trial court suspend all the proceedings other than to rule upon the motion to disqualify and warned:

> From the record now before us it appears that the motion to disqualify the trial judge was filed more than three months after counsel entered their appearance in the case. The grounds now claimed for disqualification were then known to counsel for defendant, nothwithstanding which they filed motions and initiated proceedings concerned with the merits of the action. Better practice dictates that a motion to disqualify be filed promptly when the grounds are known.[64]

IX. SEPARATE TRIALS

Only minutes before empaneling a jury, the defendant orally moved that the plaintiff's two claims be separately tried for the reason that it would be highly prejudicial to have the two causes

60 *Id.* at 557.
61 373 P.2d 523 (Colo. 1962).
62 370 P.2d 759 (Colo. 1962).
63 *Id.* at 760.
64 *Ibid.*

of action tried in the same case.[65] The motion was denied. Rule 42(b) of the Rules of Civil Procedure provides that "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim. . . ." In holding that there was no error committed by the trial court in denying the belated and untimely motion, the supreme court said:

> The rule is permissive, not mandatory, and vests in the trial court considerable discretion as to whether there shall be a separate trial for each claim of a multiple claim complaint. . . . In the instant case, seven months lapsed between the time this case was "at issue" and the time when it came on for trial. No request for a separate trial was ever interposed until only moments before the commencement of the trial proper. Under such circumstances Lamirato's counsel had the right to assume that there would be a trial of all issues framed by the complaint and the answers, and presumably all readied for trial on this premise.[66]

X. Pre-Trial Conference

1962 saw greater use of the pre-trial conference which is provided by Rule 16. The separate district courts of the state have enacted local rules of procedure, many of which provide for the use of pre-trial conferences in every case. It was then reasonable to expect that the supreme court would be called upon to interpret the enabling provisions of Rule 16 (allowing pre-trial conferences) and the specific exercises of power by the various district courts under their local rules of procedure governing pre-trial conferences.

Local Rule 5 of the District Court Rules for the Second Judicial District (Denver) precipitated an order in the nature of a contempt citation directed to two Denver attorneys in *Pittman v. District Court*.[67] On the time appointed for the pre-trial conference, the attorneys appeared in court without a written pre-trial statement as required by local Rule 5(g)(2). The pre-trial conference was continued pending submission of said written statement. At the continued conference, a statement was tendered by one of the attorneys which the court observed did not follow the rule mentioned. After the continued conference, the court entered a *nunc pro tunc* order that the offending attorneys pay $150.00 into the Registry of the Court. After this order, the principal suit was settled and stipulation was presented to the court waiving any claim to the $150.00 ordered. The court refused to approve the stipulation for dismissal, contending that the $150.00 ordered was in the nature of a disciplinary action. Attorneys against whom the $150.00 was assessed proceeded by original writ in the nature of mandamus praying that the trial court be ordered to approve the stipulation for dismissal. The supreme court observed that local rules of procedure contain wide departures from former practice and that such rules were adopted to expedite the transactions of judicial business. The court stated: "To the extent that the rules of the district court in the several judicial districts are consistent with the Rules of Civil Proce-

65 Moseley v. Lamirato, 370 P.2d 450 (Colo. 1962).
66 *Id. at 455.*
67 369 P.2d 85 (Colo. 1962).

dure adopted by this court, they will be upheld by us."[68] The court commented that in a given case there might be a situation where the trial court could properly take appropriate action against any attorney obstructing the progress of the case. The court concluded that, under the circumstances, "disciplinary action" by the imposition of the $150.00 fine was not a result of a direct contempt and that "no appropriate proceedings in contempt have been conducted in this case." The court then directed that the trial court dismiss the action in accordance with the stipulation of the parties.

Another case involving Rule 5 of the Denver District Court local rules of procedure caused the supreme court to assume original jurisdiction.[69] In this case, provisions of the local rule providing that a form of pre-trial order be "approved as to form and content" by the attorneys for the various parties was construed. Counsel for one of the parties refused to sign the pre-trial order approving the content but agreed to sign: "approved as to form only." He contended that approval as to "form and content" amounts to approval in substance of all things recited in the order. In effect, it nullifies all objections and exceptions which may have been made to the rulings of the court at the pre-trial conference. The supreme court first commented on the rule, saying:

> We hold that said local rule of the court is neither contrary to, in conflict with, nor in excess of the limitations or grants of Rule 16 of the Rules of Civil Procedure, but rather follows the mandate of and carries out the intended application and effectiveness of said Rules of Civil Procedure, in that said Rule 16 commands that the court "shall make an order which recites the action taken at the conference . . . ."[70]

Secondly, the court stated:

> The approval of the "substance" of the order is neither approval by counsel of the legal effect of the order nor of the application of substantive law which may appear in said pre-trial order, but rather, is an approval only of a recital of what transpired at the pre-trial conference.[71]

68 *Id.* at 90.
69 Albright v. District Court, 375 P.2d 685 (Colo. 1962).
70 *Id.* at 687.
71 *Ibid.*

Lastly, the court observed that the purpose of the pre-trial conference is to narrow issues and to simplify the conduct of the trial and does not waive later objections.

By the language of these cases, the supreme court would appear to be approving local rules of procedure in the Denver District Court. It would also appear, from the language of the court, that use of a pre-trial conference, and those things specifically provided for implementation of it, are approved by the Colorado Supreme Court.

The binding effect of the pre-trial order was forcefully seen in two Colorado cases. In *McNelley v. Smith*,[72] the trial court refused to admit certain photographs in evidence inasmuch as they were not submitted at the pre-trial conference nor were they furnished to adverse parties within a reasonable time prior to trial as provided in the pre-trial order. The supreme court approved the trial court's action in refusing the photographs; the pre-trial order controls the subsequent course of the action. In *Robinson v. Crosson*,[73] the pre-trial order, which was approved by the parties, determined that the only issue to be resolved was that relating to the construction of a retaining wall. The court observed:

> Since the trial court failed to adjudicate the issue which the court and the parties, in a pre-trial conference, agreed was the only one before it, we have before us, in effect, a record revealing an incomplete disposition of the case. Piecemeal relief was actually granted here. The whole controversy should have been resolved unitarily, since whatever relief could or should have been granted in the case was dependent upon possible offsetting claims.[74]

A new trial was ordered for the trial court to hear the sole issue presented in the pre-trial conference and reflected by the order.

The pre-trial conference is here to stay. Rule 16 is being continually interpreted. A labyrinth of law is being announced regarding the pre-trial procedure which is giving meaning, breadth and scope to pre-trial proceedings. Pre-trial conferences and orders necessarily entered thereafter are proper, binding and enforceable within the limitation of Rule 16.

XI. Continuance

While the granting of a continuance is not the specific subject of any rule of civil procedure, a continuance is an important question for civil procedure. *Schwarz v. Ulmer*[75] considers the denial of defendant's request for a continuance. In this quiet-title suit, defendants requested continuance for purpose of presenting testimony of one of the defendants, a mining engineer, who was seriously ill and as a consequence was unavailable as a witness. The supreme court remanded to the district court for further proceedings, stating:

> We find that the action of the trial court in denying defendants' request for a continuance under the circum-

72 368 P.2d 555 (Colo. 1962).
73 368 P.2d 791 (Colo. 1962).
74 *Id.* at 792.
75 370 P.2d 889 (Colo. 1962).

stances here presented is arbitrary and an abuse of discretion requiring reversal.

Trial was to the court, and certainly the matter could have been continued, on the terms if considered proper, without injury or appreciable inconvenience to anyone, and to the end that the court might have before it all of the available facts with reference to the very matter on which it held the evidence was insufficient. . . .[76]

XII. SUMMARY JUDGMENT

Rule 56 provides that summary judgment may be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A motion to dismiss for failure to state a claim upon which relief can be granted, under Rule 12(b), may be treated as a motion for summary judgment if matters outside the pleading are presented. Under these provisions of the rules, two Colorado cases were decided in 1962.

Welp v. Crews[77] was a case wherein summary judgment of dismissal was granted upon the pleading, depositions, answer to interrogatories and affidavits. The action was for damages as a result of loss of a loan commitment. The supreme court upheld the granting of the motion for summary judgment, finding that from depositions, one of which was plaintiff's, there was no loss of the loan commitment because of any act of the defendants. This crucial issue being established, the summary judgment was proper. The supreme court rejected the contention of the plaintiff that summary judgment was premature in that the defendant had not filed an answer. The court specifically found that Rule 56 does not require that a defendant plead before he files a motion for summary judgment.

Summary judgment for the plaintiff in *Walker v. Calada Materials Co.*[78] was reversed and the cause remanded for trial. Summary judgment in this action on a foreign judgment was granted upon tender of an exemplified copy of the California judgment together with the motion for summary judgment. An affidavit in opposition was filed by the defendant, stating that the alleged judgment attached to the motion for summary judgment was insufficient and denying that he ever authorized one Poppler to appear in his behalf in the Califonria proceeding. Plaintiffs contended that, pursuant to Rule 44(a) of the Rules of Civil Procedure, the official record was presented to the court and hence formed the basis for the summary judgment. The court observed:

> Rule 44(a) R.C.P. Colo. tells *how* an official record, be it one kept in or out of Colorado, may be evidenced, but does not purport to prescribe *what* must be established in order to prevail in an action based on a foreign judgment. Accordingly, the summary judgment entered in favor of Calada was improvident and erroneous and it is therefore reversed.[79]

Although the court did not specifically recite, it would appear that the affidavit in opposition to the summary judgment filed by the

76 *Id.* at 895.
77 368 P.2d 426 (Colo. 1962).
78 375 P.2d 679 (Colo. 1962).
79 *Id.* at 681.

defendant sufficiently made an issue of the California judgment and hence the mere proof of that judgment according to Rule 44 (a) was not sufficient to meet the test of Rule 56 that there was no genuine issue as to any material fact.

XIII. Motion for New Trial

Rule 59 provides that: "A new trial may be granted to all or any of the parties, and on all or part of the issues, after trial by jury, court or master." Thereafter follows a list of causes for which a new trial may be granted. One of those grounds is "newly discovered evidence, material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial."[80] Two Colorado cases interpret this ground for a new trial.

In *Hudson v. American Foundry Life Ins. Co. of Denver*,[81] the corporation brought an action against the president for effecting exchange of corporate stock for stock of a second corporation which became bankrupt. The president argued in his motion for a new trial that newly discovered evidence had been found. That newly discovered evidence established acceptance of shares of stock as an accord and satisfaction of a claim arising out of the exchange. The journal entries of the corporate books were specifically recited. The court again announced the well established rule that granting or denying of a motion for new trial on the ground of newly discovered evidence rests largely in the counter-discretion of the trial court. In the absence of abuse of that discretion, it will not be disturbed. The court then determined that the newly discovered evidence was merely corroborative and cumulative. It concluded: "We also have held that a trial court should deny a motion for a new trial on the ground of newly discovered evidence when such alleged evidence would be only cumulative and would not change the result."[82]

A motion for new trial on the ground of newly discovered evidence was denied, and the supreme court affirmed the trial court's order, in *Myers v. Myers*.[83] After the verdict was rendered, the losing party discovered that one of the witnesses had made statements contrary to that which he testified in the trial. The court then observed:

> No indication of surprise was then expressed by counsel, and no effort made to have the witness modify his testimony. A plaintiff cannot impeach his own witness in such circumstances, and not having claimed surprise at the time the testimony was taken, he is in no position to inject a claim of newly discovered evidence as a means of overcoming the effect of his witnesses' testimony.[84]

The defendant's choice between additur and a new trial was considered in *Herzog v. Murad*.[85] The verdict was rendered in favor of the plaintiff in the amount of $500.00; the trial court ordered an additur in the sum of $6,500.00. In the event that the defendant did

80 Colo. R. Civ. P. 59(a)(5).
81 377 P.2d 391 (Colo. 1962).
82 *Id.* at 398.
83 375 P.2d 525 (Colo. 1962).
84 *Id.* at 527
85 370 P.2d 886 (Colo. 1962).

not elect to accept this additur, a new trial would have been ordered on the issue of damages alone. Defendants elected the new trial and the trial court forthwith entered judgment for $7,000.00 in favor of the plaintiff (the verdict of $500.00 plus the $6,500.00 additur). The supreme court reversed the judgment and ordered a new trial, observing that the trial court did not translate its order into judgment. The clear terms of the order required a new trial if the additur was not accepted. Significant in the decision is that the supreme court did not object to the procedure of offering the alternative of additur or new trial.

XIV. FINAL JUDGMENT TO WHICH WRIT OF ERROR MAY LIE

It is axiomatic that writ of error will lie only to a final judgment. Rule 111 so specifically states, adding other situations where writ of error will lie. Additionally, Rule 59(f) states: "The party claiming error in the trial of any cause must, unless otherwise directed by the trial court, move that court for a new trial, and, without such order, only questions presented in such motion will be considered on review."

In a suit for injunction to prevent a water company from discontinuing water service, the trial court denied the request for injunction and entered judgment for defendant.[86] No motion for new trial or order dispensing with such motion was filed or entered. The supreme court dismissed the writ of error to the trial court's order denying the injunction, saying: "Under the Rules of Civil Procedure a new trial or an order dispensing therewith is a prerequisite to the right of a party to review in this court. This rule applies in cases where a review is sought of a pure question of law as well as questions of fact."[87]

In a personal injury action,[88] defendant's motion to dismiss the complaint for failure to state a claim was granted. There was nothing in the record to indicate that a judgment was entered or a motion for new trial filed or dispensed with. The supreme court dismissed the writ of error without prejudice to pursuing further appropriate proceedings in the trial court. These two 1962 cases follow a line of Colorado cases which have established that, under Rule 59(f), a motion for new trial or an order dispensing therewith is an absolute prerequisite to issuance of writ of error. As the 1962 cases show, it does not seem to matter which of the listed types of orders in Rule 111 to which writ of error will issue are involved. The motion for new trial must still be made.[89] It might be observed that the decisions establishing the necessity of a motion for a new trial have gone beyond the plain words of Rule 59(f). The rule does not state that the motion must be made before writ of error will issue. Rather it only limits the questions to be heard on review. The words of the rule to the contrary notwithstanding, it appears that judicial interpretation continues to make a motion for a new trial, or an order dispensing therewith, an absolute prerequisite to review of any action of the trial court.

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86 Helmick v. Consolidated Mutual Water Co., 372 P.2d 160 (Colo. 1962).
87 *Id.* at 161.
88 Carroll v. Fitzsimmons, 371 P.2d 441 (Colo. 1962).
89 In the Helmick case, an order denying an injunction (Rule 111(a)(3)) was involved.

The motion for new trial has a double-edged importance. In *Andrews v. Hayward*,[90] the trial court granted a new trial. Thereafter, defendants caused a writ of error to be issued. The supreme court, in dismissing the writ of error, cited an earlier Colorado case to the effect that there is no final judgment to which writ of error may lie if the motion for a new trial has been granted. The case must await retrial before a final judgment exists to which the writ may lie.

The question of piecemeal review was considered in *Hamm v. Twin Lakes Reservoir and Canal Co.*[91] The supreme court had issued writs of error to two different cases involving the asserted ownership of ditch easements. The two cases appeared to be inextricably interwoven with the general dispute between the parties. One of the writs of error was dismissed because no final judgment had been decreed therein. The plaintiff in error therefore moved to dismiss the present writ of error, without prejudice, and to direct the trial court to further proceed in the two cases together. The supreme court dismissed the writ, at the plaintiff-in-error's request, citing Rule 54(b). This rule allows the trial court to enter final judgment upon one, or more, but less than all of the claims, on certain conditions, where more than one claim exists. The supreme court observed that it discouraged piecemeal review of a cause and expressed an opinion that the two cases involved should be heard together. It then found that the requirement for piecemeal review found in Rule 54(b) (the determination that there is no just reason for delay) was not met. The writ of error was dismissed, without prejudice. It is interesting to note that Rule 54(b) generally applies to orders of the trial court rather than the issues originally recognized by the supreme court. In the present case, the rule was originally exercised by the supreme court.

XV. Questions Considered by the Supreme Court

Not every question will be reviewed by the supreme court on error. A number of Colorado cases decided in 1962 reaffirm this principle.

In *Shows v. Silverfield Mining and Milling Co.*,[92] various grounds for reversal were urged in the briefs, which grounds were not asserted in the motion for new trial. The motion for a new trial merely stated: "Errors of law were committed in instructing the jury and in ruling on the inadmissibility of evidence." The court stated: "Such general assignments of error do not comply with the mandate of Rule 59(f) R.C.P. Colo. which provides that only questions presented in the motion for a new trial will be considered on review."[93] Again, the importance of Rule 59(f) is underlined. In the *Shows* case, the true meaning of Rule 59(f) is mirrored.

In his motion for new trial, the defendant waived the question of tender of payment in a negotiable instruments case before the trial.[94] The supreme court held that having waived the issue in the trial court, the defendant could not reassert it on error.

90 369 P.2d 980 (Colo. 1962).
91 373 P.2d 525 (Colo. 1962).
92 375 P.2d 522 (Colo. 1962).
93 *Id.* at 525.
94 Bernklau v. Stevens, 371 P.2d 765 (Colo. 1962).

To review a judgment, the supreme court must have a transcript of the record of the proceedings in the trial court before it. Without the transcript, the supreme court cannot proceed to a determination of the issues. For example, in *Bourne v. Rose*,[95] the reporter's transcript was not lodged in apt time and was not approved by the trial judge. The supreme court therefore refused to consider the transcript on error. Likewise, in *Burton v. Garner*,[96] the court stated: "There being no transcript before us we cannot consider this ground of asserted error. In its absence we are bound to presume that the findings and conclusions of the trial court are correct and that the evidence presented supports the judgment."[97] In *Jensen v. South Adams County Water Dist.*,[98] certain statements of defendant's counsel regarding one of the medical witnesses in closing argument was urged as grounds for a mistrial which have been granted. The court observed that, in the absence of a transcript of the argument complained of, the court could not consider the issue. Finally, in *White v. White*,[99] in the absence of an offer of proof as provided under Rule 43(c), the supreme court could not determine whether certain testimony was improperly excluded by the trial court. This decision urged the importance of making the offer of proof pursuant to Rule 43(c) in order to perfect a record in the supreme court.

Camenisch v. Nuccitelli[100] asserted an axiomatic principle. Writ of error was dismissed where the plaintiff in error had suffered no

95 367 P.2d 912 (Colo. 1962).
96 374 P.2d 707, 709 (Colo. 1962).
97 *Id.* at 709.
98 368 P.2d 209 (Colo. 1962).
99 368 P.2d 417 (Colo. 1962).
100 372 P.2d 85 (Colo. 1962).

adverse ruling. The court held that the plaintiff in error had no standing to bring error.

The basic principle of appellate review was asserted in *Walker v. Casto*.[101] The court stated: "It is presumed that the trial court correctly applied the law to the facts under consideration, and the burden is upon the persons who claim error to their prejudice to show wherein the court erred."[102] As a corollary to this, five 1962 cases reaffirm the time-honored principle that the findings of the trial court on disputed issues of fact will not be disturbed when supported by competent evidence.[103]

Problems involving the record on error, which are covered by Rule 112, were raised in *Hudson v. American Founders Life Ins. Co. of Denver*.[104] Rule 112 requires that a party who seeks reversal of a judgment shall lodge the reporter's transcript with the clerk of the trial court. Thereafter, objection may be made to the transcript. In the present case, the reporter in the trial court died before transcribing his notes making it necessary for others to complete the transcription. The plaintiff in error, who had the burden of lodging the transcript, argued that the record was "uncertain." Nevertheless, pursuant to Rule 112(f), the trial judge certified the transcript which was finally prepared. The plaintiff-in-error produced no evidence or sworn testimony contradicting any portion of the transcript. The supreme court dismissed the objection to the record and proceeded to determine the matter on the record as certified.

XVI. Relief of Judgment

An often misunderstood remedy under Rule 60 was interpreted twice by the Colorado Supreme Court in 1962. Rule 60(b) provides: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons. . . ." Frequently this rule is confused with the motion for a new trial provided at Rule 59. *Burson v. Burson*[105] clarified the purpose of Rule 60. In this case, a decree of divorce and order of custody for a minor child was entered without contest. Nothing was said in the decree regarding alimony. Nine months after entry of the decree of divorce, the wife filed a motion to fix alimony payments. The trial court dismissed the wife's motion, denying her alimony, and the wife sought review by writ of error. Since the provided time for issuance of writ of error had expired, the court noted that "(Rule 60(b)) permits the court to relieve a party from a final judgment or order for 'mistake, inadvertence, surprise or excusable neglect.'"[106] The court then stated, "Any right to modify the original judgment in light of the allegations contained in the motion would arise from this portion of Rule 60. But such relief must be sought 'not more than 6 months after judgment.' R.C.P. Colo. 60."[107]

In another domestic relations case, respondent filed a motion

101 372 P.2d 438 (Colo. 1962).
102 *Id.* at 440.
103 Watson v. Settlemeyer, 376 P.2d 453 (Colo. 1962); Denton v. Kumpf, 373 P.2d 306 (Colo. 1962); Heckel v. Heckel, 373 P.2d 303 (Colo. 1962); Cline v. Whitten, 372 P.2d 145 (Colo. 1962); People v. Cooke, 370 P.2d 896 (Colo. 1962).
104 377 P.2d 391 (Colo. 1962).
105 369 P.2d 979 (Colo. 1962).
106 *Id.* at 980.
107 *Ibid.*

under Rule 60(b) to vacate the trial court's judgment and order regarding support for a minor child. The motion was filed about twenty-five months following decree of judgment.[108] The court, quoting from an earlier Colorado decision,[109] said: "Such motion [under Rule 60], in any event, is directed to the discretion of the trial court, and when one files such a motion he admits for all practical purposes that the judgment is in all respects regular on the face of the record, but asserts that the record would show differently except for mistake, inadvertence, or excusable neglect on behalf of counsel or client."[110]

Both of the above cases arise under Rule 60 inasmuch as direct appellate review by writ of error was foreclosed. The three-month time limitation had run. Properly, a motion under Rule 60(b) is the remedy afforded one whose time for direct appellate review has expired and who can come within the listed provisions of Rule 60(b).

XVII. ORIGINAL PROCEEDINGS UNDER RULE 106

That curious and mysterious area of "original proceedings" again had its test in the Colorado Supreme Court in 1962. Rule 106 abolishes the special forms of pleading and writs of quo warranto, certiorari and prohibition, among other writs. However, we continue to see reports of these writs being granted both in the supreme court and in the inferior courts. For example, thirteen such "original proceedings" were reported in 1962. Sometimes, the proceedings are attended with the names of the common law writs; at other times the proceedings bear the title "in the nature of Writ of . . ."; and more frequently the proceedings are merely called "original proceedings." Rule 106(a), by its five subdivisions, describes relief which could be labeled by common law terminology. Hence, it is proper that the supreme court grant this relief. And the supreme court did grant such relief in 1962; eight times by prohibition,[111] twice by mandamus,[112] once by certiorari[113] and once by quo warranto.[114] In addition, the supreme court entertained an original proceeding for issuance of prerogative or remedial writ to require the general assembly to reapportion.[115] The substance of the relief granted in each case is fully reported under other subdivisions of this review.

The Colorado Supreme Court in 1962 considered and interpreted the more active rules of civil procedure. The court was consistent with prior rulings in the area of civil procedure and added another year of decisions to assist in a predictable and orderly administration of just remedies in the courts of record of the state of Colorado.

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108 Robles v. People, 373 P.2d 701 (Colo. 1962).
109 Johnson v. Johnson, 132 Colo. 236, 287 P.2d 49 (1955).
110 Robles v. People, note 108 *supra*, at 702.
111 Gould and Preisner v. District Court, 369 P.2d 554 (Colo. 1962); Board of Directors v. Jeffrey, 370 P.2d 447 (Colo. 1962); Bay Aviation Services v. District Court, 370 P.2d 752 (Colo. 1962); Dominic v. District Court, 370 P.2d 759 (Colo. 1962); District Attorney v. District Court, 371 P.2d 271 (Colo. 1962); Bardahl v. District Court, 372 P.2d 447 (Colo. 1962); Martin v. District Court, 375 P.2d 105 (Colo. 1962); Albright v. District Court, 375 P.2d 685 (Colo. 1962).
112 Treat v. McDonough, 367 P.2d 587 (Colo. 1962); Pitman v. District Court, 369 P.2d 85 (Colo. 1962).
113 Berry v. Parole Board, 367 P.2d 338 (Colo. 1962).
114 People v. Lakehurst, 373 P.2d 946 (Colo. 1962).
115 In the Matter of Legislative Reapportionment, Stein v. General Assembly, 374 P.2d 66 (Colo. 1962).